Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Emergency Petition for	)	WC Docket No. 04-245
Declaratory Rule and Preemption of	)	
State Action	)	
	)	

EMERGENCY PETITION FOR DECLARATORY RULING AND PREEMPTION OF STATE ACTION

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") brings this emergency petition to enforce the unambiguous provisions of the 1996 Act and clear Commission precedent by 1) declaring that it, and not state commissions, enforce the provisions of Section 271, and 2) preempting a recent order of the Tennessee Regulatory Authority that illegally asserts enforcement authority. On June 21, 2004, the Tennessee Regulatory Authority ("TRA") issued an order that claims to set a "market rate" for switching for customers with four or more lines in the Top 50 MSAs in the context of a section 252 arbitration, citing its authority under "section 271 of the Act." The TRA issued this ruling despite clear pronouncements from this Commission that state commissions have no authority under section 271 to regulate elements provided only pursuant to section 271 ("271 elements").[1] This action by the TRA unquestionably violates the statute, Commission orders, and federal precedent. Critically, it also has the effect of bringing uncertainty to the regulatory scheme at a time in which certainty in the

[1] Critically, last week DIECA Communications, Inc. (d/b/a Covad) filed petitions in 7 states in BellSouth's region seeking the exercise of state commission jurisdiction over line sharing pursuant to Sections 271, 201 and 202. While no state commission has acted on these petitions yet, it is critical that the Commission act quickly to ensure that no other state commission unlawfully exercises jurisdiction over non-251 elements. A copy of the Covad petition from Alabama is attached hereto (with attachments omitted) as Exhibit A for illustrative purposes.

regulatory landscape is critical and terminating any incentive of carriers to enter into commercial agreements.

STATEMENT OF FACTS

On February 7, 2003, ITC^DeltaCom filed a petition for arbitration of an interconnection Agreement pursuant to Section 252 with the TRA. Issue 26 of the Parties' issues list specified as follows:

> Local Switching – Line Cap and Other Restrictions
>
> (a) Should the interconnection agreement include language that prevents BellSouth from imposing restrictions on DeltaCom's use of local switching?
>
> (b) Should BellSouth provide local switching at market rates where it is not required to provide local switching as a UNE?
>
> (c) If so, what should be the rate?

Issues List, August 15, 2004, Docket No. 03-00119, attached hereto as Exhibit B. Specifically, the parties dispute focused on the rates, terms and conditions for switching in cases in which BellSouth qualifies for the Section 251 switching exemption under Rule 51.319(c)(2). DeltaCom took the position that BellSouth had no restrictions on its obligation to provide local switching as a Section 251 UNE "unless BellSouth can demonstrate harm to its network." *Issues List*, at 12.

In response to Issue 26(b) and (c), BellSouth stated as follows:

> (b) BellSouth will provide local switching at market-based rates where BellSouth is not required to unbundled local switching.
>
> (c) An arbitration under § 251 of the 1996 Act is not the appropriate forum for resolution of this issue.

Id. In other words, BellSouth's position was that for non-251 switching, BellSouth would provide it pursuant to Section 271 at market-based prices.

Consistent with its stated position in the Issues List, BellSouth maintained its position that the TRA did not have jurisdiction over the market rate throughout the proceeding. For example, BellSouth filed the testimony of Kathy Blake, which set forth the position that the state commission had no jurisdiction to regulate switching that BellSouth did not provide pursuant to Section 251. *Direct Testimony of Kathy Blake,* August 4, 2003, Docket No. 03-00119, attached hereto as Exhibit C. In its post-hearing brief, BellSouth argued that "the TELRIC pricing standards do not apply to non-UNE switching; thus, the Authority has no jurisdiction, as a matter of law, in the context of a Section 252 arbitration proceeding, to set such rates." ***BellSouth's*** *Post-Hearing* Brief, Docket No. 03-00119, at 54, excerpt attached as Exhibit D. BellSouth further argued that "[t]he appropriate pricing standard for non-UNEs is found in Sections 201 and 202 of the 1996 Act" and that the FCC (not state commissions) will be the final arbiter of whether a non-UNE rate is 'just and reasonable' under the 1996 Act." *Id.* at 54-55. BellSouth reiterated its position that the state commission lacks jurisdiction over this issue after the briefing schedule. *See* April 8, 2004 Letter from Guy Hicks to Hon. Deborah Taylor Tate, Docket No. 03-00119, at 1 fn. 1 ("[t]here is no jurisdiction in a 252 arbitration to consider – much less set – rates for services that are not required to be provided at UNE rates...[y]et, CLECs have a forum to address this matter – the FCC. Only the FCC has jurisdiction to determine whether market rates are just and reasonable in the event of a dispute").

Despite ample evidence in the record and in the face of clear Commission precedent, the TRA held that it had jurisdiction to regulate the rates, terms and conditions of switching provided pursuant to Section 271. On Monday, June 21, 2004, the TRA established an interim rate for switching provided pursuant to Section 271 subject to true-up at the conclusion of a generic

docket conducted by the TRA or conclusion of successful commercial negotiations.[2] *Transcript of Proceeding*, 6/21/04, at 8-9, attached hereto as Exhibit E. The TRA voted 2-1 for the following motion:

> Why don't I just make a separate motion that we adopt the DeltaCom final best offer of 5.08 and establish that as an interim rate subject to true up and request that the chair open a generic docket to adopt a rate for switching outside 251 requirements.

Transcript of Proceedings, 6/21/04, at 8, Exhibit E.

The improper assertion of jurisdiction underlying the TRA's decision is evident from the deliberations that preceded the TRA's vote. First, one Director stated the issue before the TRA as being "a determination as what the market rate should be for unbundled switching provided pursuant to Section 271 of the Act." *Transcript of Proceeding*, at 4. While he went on to accurately state the standard for regulating rates for 271 elements ("the pricing for them and market base [sic] has a particular standard of just and reasonable"), and accurately referenced the test for assessing whether a rate is just and reasonable,[3] the TRA erred in concluding that it had the jurisdiction to regulate the rate or any other term or condition of the 271 elements. *Transcript of Proceeding*, at 4. Second, prior to making the motion upon which the TRA voted, another Director asked that the TRA adopt DeltaCom's rate as an interim rate "and further request[s] that [the Chairman] open a docket to adopt a rate for switching outside of 251 requirements." *Transcript of Proceedings*, at 6 (emphasis added). The TRA Directors agreed

[2] Of course, the rate setting by the TRA effectively eliminates any hope for commercial negotiation of unbundled switching.

[3] "BellSouth failed to demonstrate that its proposed final best offer, its 271 switching rate, is at or below the rate at which BellSouth offers comparable functions to similarly situated purchasing carriers under its interstate access tariff or that the 271 switching element final best offer is reasonable by showing that it has entered into arm's length agreements with other similarly situated purchasing carriers to provide as inclusive standalone switching at the rate proposed in the final best offer."

"that it would be appropriate to open a generic docket," thereby asserting jurisdiction to set a permanent rate. *Id.* at 7.

The TRA's decision fundamentally misconstrues the law and will thwart federal policy and this Commission's encouragement of commercial negotiations.

ARGUMENT

I. THE COMMISSION SHOULD DECLARE THAT STATE COMMISSIONS HAVE NO JURISDICTION OVER ELEMENTS PROVIDED PURSUANT TO SECTION 271 FOR WHICH THERE IS NO COMMISSION IMPAIRMENT FINDING UNDER SECTION 251.

To avoid state commission regulation of network elements provided under section 271 and for which there is no impairment finding under section 251, the Commission should reinforce its previous rulings and declare that state commissions have no jurisdiction over the rates, terms and conditions of elements provided by RBOCs to CLECs pursuant to section 271.

A. RBOCs currently have section 271 obligations that are separate and apart from the unbundling obligations set forth in section 251.

Absent forbearance by this Commission, RBOCs currently are obligated under 47 U.S.C. § 271 to provide certain enumerated network elements to CLECs irrespective of whether CLECs are impaired without access to such elements.[4] *Triennial Review Order,* at ¶ 653. This "independent and ongoing access obligation" is based, according to the Commission, upon the language and structure of Section 271(c)(2)(B) and upon the Commission's decision "to interpret sections 251 and 271 as operating independently." *Id.*; *see also UNE Remand Order*, at ¶ 470.[5]

[4] This position is consistent with the position set forth in BellSouth's pending Petition for Forbearance, filed March 1, 2004, in which BellSouth argued that Section 271 elements are not subject to Section 251 unbundling obligations.

[5] "If a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a).

Section 251, on the one hand, requires that RBOCs unbundle only those network elements for which "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B). By contrast, even absent a finding of impairment, RBOCs are currently obligated to provide certain elements, including loops and switching, pursuant to section 271. 47 U.S.C. § 271(c).

B. State Commissions have no jurisdiction over elements provided pursuant to Section 271.

Section 271 vests authority in the Commission to regulate network elements provided pursuant to that section for which no impairment finding has been made. 47 U.S.C. § 271. For example, section 271(d)(1) provides that to obtain interLATA relief, a BOC "may apply to the Commission for authorization to provide interLATA services...." 47 U.S.C. 271(d)(1). Congress gave this Commission the exclusive authority for "approving or denying the authorization requested in the application for each State." 47 U.S.C. § 271(d)(3); *see also South Carolina 271 Order*, ¶ 29 ("although the Commission will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the Commission's role to determine whether the factual record supports a conclusion that particular requirements of section 271 have been met"). And, of particular relevance here, once a BOC has obtained Section 271 authority (as BellSouth has in Tennessee), continuing enforcement of section 271 obligations rests solely with the Commission. 47 U.S.C. § 271(d)(6). Section 271(d)(6)(A) provides that

> if at any time after the approval of an application under paragraph (3), *the Commission* determines that a Bell operating company has ceased to meet any of the conditions required for such approval, *the Commission* may, after notice and opportunity for a hearing [impose sanctions].

Id.; see also 47 U.S.C. § 271(d)(6)(B) ("[t]he Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3)") (emphasis added).

The only role Congress gave the state commissions in section 271 is a consultative role during the approval process. 47 U.S.C. § 271(d)(2)(B). The statute provides that the Commission "shall consult with the State commission"; the directives to approve or deny applications and to decide enforcement matters is exclusively given to the Commission and no specific responsibility is delegated to the state commissions. *Id.*

The conclusion that this Commission, not state authorities, enforces Section 271 is bolstered by the plain text of Section 252. Section 252 grants specific authority to the state commissions, but explicitly limits that authority to those agreements entered into "pursuant to section 251." 47 U.S.C. § 252(a)(1). For instance, only agreements requested "pursuant to Section 251" "shall be submitted to the State Commission" for approval under Section 252(e).[6] Similarly, the competitive carrier's initial "request" for an agreement "pursuant to Section 251" triggers the state arbitration period in Section 252(b),[7] and only such agreements are available for arbitration by state commissions under Section 252(c) and (d).[8]

Of equal importance, under Section 251(c)(1), state commissions are authorized to impose arbitrated results only to ensure that any agreements "meet the requirements of Section 251;" Congress did not authorize a state commission to ensure that an agreement satisfies Section 271. Indeed, of particular relevance here, the state commission's authority to set rates is

[6] 47 U.S.C. § 252(a)(1) & (e). And, a state may only reject an agreement "if it finds that the agreements do not meet the requirements of Section 251." 47 U.S.C. § 252(e)(2)(B).

[7] 47 U.S.C. § 252(b)(1)

[8] 47 U.S.C. § 252(b) & (c).

specifically tied to the requirements of Section 251. See 47 U.S.C. § 252(c)(2), (d)(1) (authorizing state commissions to set rates "for purposes of" the interconnection and access to network elements required by Sections 251(c)(2) and (c)(3). In sum, Section 252 grants state commissions authority only over the implementation of Section 251 obligations, not Section 271 obligations. *See also MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F. 3d 1269, 1274 (11th Cir. 2002) (requirement that ILEC negotiate items outside of section 252 "is contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate. *See* 47 U.S.C. §§ 251(b), (c) (setting forth the obligation of all local exchange carriers and incumbent local exchange carriers, respectively)."

C. Section 271 elements for which no impairment finding has been made under section 251 are regulated under Section 201 and 202 of the Act.

The fact that elements provided pursuant to Section 271 for which there is no finding of impairment are regulated under Sections 201 and 202 should be uncontroversial.[9] In the *UNE Remand Order*, the Commission held:

> If a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a).

UNE Remand Order, at ¶ 470. In the Texas 271 Order, the Commission stated unequivocally with respect to directory assistance and operator services that because they had been removed "from the list of required unbundled network elements," they no longer fell "within a BOC's obligations to provide unbundled network elements" and thus were "not subject to the requirements of sections 251 and 252, including the requirement that rates be based on forward-looking economic costs." *SWBT Texas Order*, at ¶ 348. More specifically, the Commission held

[9] The TRA accurately set forth the test, *Transcript of Proceedings*, at 4, but then chose not to apply it.

that "[c]hecklist item obligations that do no fall within a BOC's UNE obligations, however, still must be provided in accordance with sections 201(b) and 202(a), which require that the rates and conditions be just and reasonable, and not unreasonably discriminatory." *Id.*

The Commission explicitly confirmed that elements provided pursuant to Section 271 for which there is no impairment finding under Section 251 are regulated under Sections 201 and 202. In the *Triennial Review Order,* the Commission held that "whether a particular checklist item's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact specific inquiry" that the FCC will undertake either in the context of an application for interLATA authority under Section 271 or in an enforcement proceeding brought pursuant to Section 271(d)(6). *Triennial Review Order*, at ¶ 664. The Commission also decided "that the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis—the standards set forth in Sections 201 and 202," *id.* at ¶ 656, and noted that "no party has suggested in [the TRO] proceeding that the Commission's interpretation of the statute has produced a perverse policy impact with respect to a BOC's provision of these network elements." *Triennial Review Order*, at ¶ 661.

In *USTA II,* the D.C. Circuit affirmed the Commission's decision on the pricing standard for 271 elements in the *Triennial Review Order* and rejected the CLECs' contrary position holding that "the CLECs have no serious argument that the text of the statute clearly demonstrates that the §251 pricing rules apply to unbundling pursuant to §271 checklist items four, five, six and ten." *USTA II,* at 52. The Court also agreed "that none of the [nondiscrimination] requirements of §251(c)(3) applies to items four, five, six and ten on the § 271 competitive checklist," while recognizing that "[o]f course, the independent unbundling

under § 271 is presumably governed by the *general* nondiscrimination requirement of § 202." Id. at 53.

The Commission has held that it retains exclusive jurisdiction to regulate Section 271 elements under Sections 201 and 202. For example, "whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry that *the Commission* will undertake in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6)." *Triennial Review Order*, at ¶ 664 (emphasis added). The law provides only two enforcement mechanisms available for an RBOC's compliance with Section 271 requirements – a 271 application and a 271 enforcement proceeding. Because both mechanisms are vested entirely with the Commission, its jurisdiction over 271 elements is necessarily exclusive.

Courts uniformly have held that claims based on Sections 201(b) and 202(a) are within the Commission's jurisdiction. Section 201(b) speaks in terms of "just and reasonable" which are determinations that "Congress has placed squarely in the hands of the Commission." *In Re: Long Distance Telecommunications Litigation,* 831 F.2d 627, 631 (6th Cir. 1987) (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981)); *see also Total Telecommunications Services Inc. v. American Telephone & Telegraph Co.*, 919 F. Supp. 472, 478 (D.C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd.*, 99 F.3d 448 (D.C. Cir. 1997). As the D.C. Circuit noted in *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, (D.C. Cir. 1996), Sections 201(b) and 202(a) "authorized the Commission to establish just and reasonable rates, provided that they are not unduly discriminatory."

The idea of Commission regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel. Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act" and required that state commission regulation be guided by Commission regulations. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n. 6 (1999); *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004).

II. TO AVOID CIRCUMVENTION OF THE REGULATORY SCHEME ESTABLISHED BY THE ACT, THE COMMISSION SHOULD DECLARE UNLAWFUL AND PREEMPT THE ORDER OF THE TRA ASSERTING JURISDICTION UNDER SECTION 271.

This Commission is authorized to issue declaratory rulings under section 1.2 of its General Rules of Practice and Procedure: "The Commission may, in accordance with section 5 (d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. While it is not necessary for a petitioner to show a "case or controversy in the judicial sense" in order to obtain declaratory relief from the Commission,[10] there must be a showing of a "genuine controversy or uncertainty [that] requires clarification."[11] The Commission has "broad and discretionary powers" to issue declaratory relief.[12]

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[10] Memorandum Opinion and Order, *Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission*, 93 F.C.C.2d 1287, 1290, ¶ 9 (1983) (internal quotation marks omitted).

[11] Memorandum Opinion and Order, *BellSouth's Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver of the CPE Rules to Provide Line Building Out (LBO) Functionality as a Component of Regulated Network Interface Connectors on Customer Premises*, 6 FCC Rcd 3336, 3342-43, ¶ 27 (1991).

[12] Memorandum Opinion and Order, *Telerent Leasing Corp. et al. Petition for Declaratory Rulings on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-furnished Equipment to the Nationwide Switched Public Telephone Network*, 45 F.C.C.2d 204, 213, ¶ 21 (1974) ("Telerent").

The purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists.[13] The Commission has previously held that declaratory relief was especially appropriate to address uncertainty and confusion caused by a communications company having to comply with state regulatory decisions that were contrary to prior FCC decisions. *See Telerent*, 45 F.C.C.2d at 214, ¶ 22, 220, ¶ 38 ("We would be remiss in the discharge of our broad statutory responsibilities to remain passive in the face of the policy and regulatory confusion which permeates the entire field of interconnection as a result of these State actions."; "No State regulation can oust this Commission from its clear jurisdiction over interstate communications and the regulation of the terms and conditions governing such communication . . . .").

Thus, this Commission has every right and reason to preempt any state commission determination that attempts to regulate the rates, terms, or conditions of any element provided pursuant to Section 271.

When state commission action conflicts with federal policy, a federal agency can preempt the state action. *Triennial Review Order,* at ¶ 196 (citing, *inter alia, Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (where state law frustrates the purposes and objectives of Congress, conflicting state law is "nullified" by the Supremacy Clause)). As the Commission has held, "states would be precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in [the *Triennial Review Order*]." *Id.* (citing, *inter alia, Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 154 (1982) ("A pre-emptive regulation's force does not depend on express congressional authorization to displace state law")). The Commission expressly invited aggrieved parties to

[13] *See* Memorandum Opinion and Order, *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's Rules and Regulations*, 92 F.C.C.2d 864, 879, ¶ 43 (1983).

file petitions for declaratory ruling such as this one where state commission determinations are contrary to the principles set forth in the *Triennial Review Order*. *Triennial Review Order*, at ¶ 195.

The plain language of Section 271, and the Commission's orders interpreting Section 271, limit state regulatory authority to those elements unbundled pursuant to Section 251 and not those provided pursuant to Section 271. A state commission's assertion of jurisdiction over elements provided pursuant to Section 271 would "thwart or frustrate" the federal regime set forth in the *Triennial Review Order*.[14] The Commission held that the Act requires that "the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in Sections 201 and 202." *Triennial Review Order*, at ¶ 656. In direct contravention of that federal policy, the TRA made "a determination as what the market rate should be for unbundled switching provided pursuant to Section 271 of the Act." *Transcript of Proceedings*, at 4. The TRA was explicit about the fact that it was acting under Section 271 and its plans to "open a docket to adopt a [permanent] rate for *switching outside of 251 requirements*." *Transcript of Proceedings*, at 6 (emphasis added).

The Commission has held that as a matter of national policy, it retains exclusive jurisdiction to regulate elements provided pursuant to Section 271. By asserting jurisdiction over such elements, the TRA has displaced the federal public interest determination as to how the local networks should be regulated and thwarted the implementation of that regulatory scheme. The TRA's action is especially troubling given the negative effect it will have on commercial

[14] Importantly, lack of state jurisdiction does not deprive CLECs of a forum to challenge rates; that forum, however, is the Commission.

negotiations. Specifically with pricing, but the same is true of all terms and conditions, the Commission recognized that a finding of no impairment

> is predicated in large part upon the fact that competitors can acquire switching in the marketplace at a price set by the marketplace. Under these circumstances, it would be *counterproductive* to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.

UNE Remand Order, at ¶ 473 (emphasis added). The Commission should prevent such counterproductive activities by the state commissions.

In sum, the Commission should act on this Petition because the action of the TRA frustrates the mechanism Congress implemented to govern the regulation and development of local service competition. *See Indiana Bell Telephone Company*, 359 F.3d at 497 (state commission action "preempted where what the state has done is an obstacle to the execution of Congress's purpose or frustrates that purpose by interfering with the methods Congress selected to achieve a federal goal even when the state goal is identical to the federal goal..."). Permitting state commissions to regulate network elements for which no impairment has been found will jeopardize the development of true market-based competition by leaving no room for the commercial negotiations this Commission has lauded as the means by which competition should grow.[15]

[15] The TRA Chairman, citing her preference for negotiated market-based rates, dissented from her colleagues' vote. *Transcript of Proceedings*, at 7.

REQUEST FOR RELIEF

Accordingly, the Commission should declare that states have no authority to regulate elements provided pursuant to Section 271. In addition, the Commission should preempt the order of the TRA purporting to exercise state authority over Section 271 elements.

Respectfully submitted,

Jon Banks
Lisa Foshee

BellSouth Telecommunications, Inc.
675 West Peachtree Street, Stiite 4300
Atlanta, Georgia 30375

542461

Exhibit A

BEFORE THE

ALABAMA PUBLIC SERVICE COMMISSION

Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996	))))))	**Docket No.**

PETITION FOR ARBITRATION

NOW COMES, DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") and respectfully submits this Petition for Arbitration in accordance with Section 12 and 16 of the Parties' Interconnection Agreement; 47 U.S.C. § 252; and Rules, Regulations and Orders of this Commission, including, without limitation, Rule T-26.

Communications regarding this Petition should be directed to:

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Covad respectfully requests that the Alabama Public Service Commission ("Commission") resolve one important open issue resulting from the interconnection negotiations between Covad and BellSouth Telecommunications, Inc. ("BellSouth") (BellSouth and Covad are collectively referred to herein as the "Parties"). Covad requests that the Commission resolve the issue designated herein by ordering the Parties to amend their interconnection one "B" agreement to incorporate Covad's position. This Petition includes: (1) the Prefiled Testimony of William H. Weber; (2) the General Terms and Conditions and Attachment 2 to the Parties' current interconnection agreement (Attachment

A) (the entire interconnection agreement is on file with the Commission); (3) The disputed issue for which Covad seeks Commission resolution, with the position of the Parties on the issue and reference to the applicable section of the agreement (Attachment B); and (4) a matrix depicting the suggested language of Covad and BellSouth on the disputed issue (the "Proposed Language Matrix") (Attachment C).

PARTIES

1. Covad is a Virginia corporation and a wholly-owned subsidiary of Covad Communications Group, Inc., a publicly traded corporation formed under the laws of the state of Delaware. Covad is a telecommunications carrier authorized to provide telecommunications services in the State of Alabama.

2. BellSouth is a corporation organized and formed under the laws of the State of Georgia. BellSouth is a certificated local exchange and intraLATA interexchange carrier and currently provides local service, intraLATA service and other services within its certificated areas in Alabama. BellSouth is an incumbent local exchange carrier ("ILEC") in Alabama as defined by Section 251(h) of the Act. 47 U.S.C. §251(h). BellSouth is also a regional Bell operating company ("RBOC") as defined by 47 U.S.C. §153 and 274(i)(3). Within its operating territory, BellSouth has been the incumbent local exchange provider of telephone exchange services at all relevant times.

JURISDICTION

3. Jurisdiction over this matter is conferred by 47 U.S.C. § 252 as interpreted by the Fifth Circuit Court of Appeal in *Coserv v. Southwestern Bell Telephone*, 350 F.3d 482, 487 (5th Cir. 2003), providing that "where the parties have voluntarily included in negotiations issues other than those duties required of

an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). The jurisdiction of the PUC as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations." Here, BellSouth proposed an amendment to the parties' interconnection agreement, including proposed rates, to implement the line sharing transition plan created by the FCC in the *TRO* under its Section 201(b) jurisdiction – not under Section 251. *TRO* ¶ 267 (providing that "Section 201(b) gives the Commission broad authority to adopt the transition mechanism set forth in this Part and nothing in that provision limits our authority with respect to rates."). Covad responded to BellSouth's request to negotiate (including BellSouth's proposed amendment) with a counter-proposal. Covad agreed to voluntarily negotiate non-251 access to line sharing, but counter-proposed an amendment to set rates under Section 201's "just and reasonable" standard on the ground that BellSouth was subject to an obligation to provide access to line sharing under Section 271, along with its accompanying "just and reasonable" pricing standard. *TRO* ¶¶ 661-664. Accordingly, BellSouth and Covad entered into voluntary negotiations for non-251 access to line sharing. Having failed to reach agreement over that access, Covad submits the dispute under Section 252 and pursuant to the timeline contained in the parties' interconnection agreement.

4. This Commission has jurisdiction over Covad's Petition pursuant to sections 12 and 16 of the Parties' Interconnection Agreement ("Agreement"). Attachment A, Sections 12 and 16. The Commission also has jurisdiction over

Covad's Petition pursuant to 47 U.S.C. § 252 as well as Rules, Regulations and Orders of this Commission, including, without limitation, Rule T-26. On December 4, 2003,[1] BellSouth provided Covad with proposed amendments to the Parties Agreement related to the Federal Communications Commission's Triennial Review Order pursuant to Section 16.3, the change of law provision, of the Parties' Agreement. In thirty-two (32) separate paragraphs and an Exhibit containing rates BellSouth's proposed amendments to Attachment 2 of the Agreement related to line sharing rates, terms and conditions. On April 16, 2004, Covad provided BellSouth with its counter-proposal regarding amendments related to line sharing rates, terms and conditions.

5. Section 16 of the Agreement provides that in the event that proposed amendments to implement changes in law are not renegotiated within ninety (90) days after a party requests such a negotiation, the dispute shall be referred to the Dispute Resolution procedure set forth in the Agreement. Section 12, entitled Resolution of Disputes, provides that in the event that there is a dispute, "either Party may petition the Commission for a resolution of the dispute." Accordingly, Covad respectfully petitions the Commission to resolve the Parties' dispute over access to line sharing.

PARTIES' NEGOTIATIONS VIS-À-VIS SECTION 251 – RULE T-26(2)(b)

6. Covad adopts by reference paragraph 3 of this petition and further states: BellSouth has an obligation to provide access to line sharing under 47 U.S.C. § 271(c)(2)(B)(iv) because line sharing has always been and remains a checklist

[1] See Rule T-26(2)(a).

item 4 loop transmission facility and RBOCs offering long distance services pursuant to 271 authority have an obligation to provide checklist item 4 elements irrespective of unbundling determinations under 251, albeit under a different pricing standard. The pricing standard for network elements provided pursuant to 271 obligations is the "just and reasonable" standard provided in 47 U.S.C. § 201. This position is supported by the FCC's Triennial Review Order at paragraphs 649-667, as well as the previous orders of the FCC granting BellSouth 271 authority.

STANDARD OF REVIEW

7. This arbitration must be resolved by the standards established in Sections 201, 202, 252 and 271 of the Act and the effective rules adopted by the Federal Communications Commission ("FCC").

ISSUES IN DISPUTE

8. While BellSouth proposed numerous changes to the Parties Interconnection Agreement in its December 4, 2003 proposed TRO amendment, Covad and BellSouth have only exchanged proposed language regarding line sharing. Moreover, many of the changes proposed by BellSouth were (or will be when the mandate issues) reversed and/or vacated by the March 2, 2004 decision of the United States District Court of Appeals for the District of Columbia Circuit. Line sharing, however, was not one of the issues reversed or vacated. As a consequence, Covad only seeks Commission resolution as to a single open issue: line sharing, as set forth in Attachments B and C to this Petition. Attachment B includes a short description of the issue, assigns the issue a

number, sets forth the position of Covad and BellSouth, and identifies the section(s) of the Interconnection Agreement which are affected.

9. Attachment C to this Petition is the Proposed Language Matrix, which depicts the proposed language of Covad and BellSouth on the disputed issue. Rule T-26(2)(b).

10. Covad respectfully requests expedited treatment of this petition because it presents only one issue for review and because BellSouth has taken the position that it will no longer be obligated to provide line-sharing after October, 2004. To the extent BellSouth remains steadfast in this position, Covad respectfully requests an order maintaining the status quo pending the outcome of this Arbitration Petition. See Rule T-26(2)(e) & (f).

11. Discovery should not be required in this proceeding. See Rule T-26(2)(g).

RELIEF REQUESTED

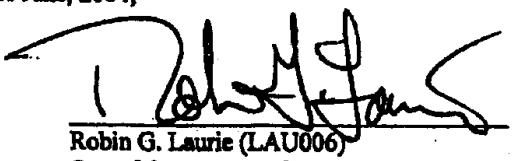
WHEREFORE, Covad respectfully requests that the Commission arbitrate the open issue identified in this Petition in accordance with Sections 201, 202, 252 and 271 of the Federal Telecommunications Act of 1996, and adopt the positions of Covad as set forth therein, and require the parties to amend their Interconnection Agreement to incorporate and adopt the specific terms and contract language proposed by Covad, which are identified in the Proposed Language Matrix (Attachment C).

Covad further requests that the Commission order the Parties to file on a date certain an amended Interconnection Agreement (between Covad and BellSouth), incorporating the Commission's decision as described above, for approval by the Commission pursuant to Section 252(e) of the Act.

CONCLUSION

For all the foregoing reasons, Covad respectfully requests this Commission resolve the issue identified in favor of Covad and by approving the attached proposed interconnection agreement.

Respectfully submitted this 23rd day of June, 2004,



Robin G. Laurie (LAU006)
One of the attorneys for Covad
Communications Company

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VERIFICATION

STATE OF GEORGIA)
)
COUNTY OF FULTON)

Before me, the undersigned authority, duly commissioned and qualified in and for the State and County aforesaid personally came and appeared Charles E. Watkins who, being by me first duly sworn, deposed and said that:

He is the Senior Counsel of DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"), Petitioner in the foregoing proceeding, that he has read the foregoing Petition for Arbitration filed on behalf of Covad and knows the contents thereof; that the same are true of his knowledge, except as to matters which are therein stated upon information and belief, and as to those matters he believes them to be true.

Charles E. Watkins
Senior Counsel, Covad Communications

Sworn to and Subscribed to before me this 23rd day of June, 2004.

[SEAL]

Notary Public

My Commission Expires: 3/18/2006

JAYNA L. BELL NOTARY PUBLIC DEKALB COUNTY, GA COMMISSION EXPIRES MAR 18 2006

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following on this the 24th day of June, 2004:

Francis B. Semmes, Esq. (via electronic delivery and via overnight delivery)
BellSouth
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Birmingham, Alabama 35243

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BellSouth Local Contract Manager
600 North 19th Street, 8th Floor
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ICS Attorney (via overnight delivery)
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Of Counsel